



CITY OF KIRKLAND
Department of Public Works
123 Fifth Avenue, Kirkland, WA 98033 425.587.3800
www.kirklandwa.gov

MEMORANDUM

To: Kurt Triplett, City Manager

From: Ray Steiger, P.E., Public Works Director
Robin Jenkinson, City Attorney

Date: September 6, 2012

Subject: Kirkland Participation in NPDES Phase II Municipal Stormwater Permit Appeal

RECOMMENDATION:

Staff recommends that Council approve the attached resolution authorizing the City Manager to sign the attached interlocal agreement for legal services associated with appeal of the National Pollutant Discharge Elimination System (NPDES) Phase II Municipal Stormwater Permit. The interlocal agreement commits Kirkland to contributing up to \$25,000 from stormwater utility rates towards legal costs associated with the appeal.

BACKGROUND DISCUSSION:

The Phase II NPDES Municipal Stormwater Permit (Permit) requires that local jurisdictions with a population of less than 100,000 meet certain conditions in order to discharge stormwater from their municipal separate stormwater system to Waters of the US. In general, those conditions are to develop and implement programs in each of the following areas as stipulated in the Federal Clean Water Act:

- Public Involvement
- Public Education
- Illicit Discharge Detection and Elimination
- Control of Runoff from New Development, Redevelopment and Construction Sites
- Municipal Operations and Housekeeping
- Reporting and Monitoring to Support the Above Elements.

In Washington, the State Department of Ecology has been authorized to write the Permit. Ecology issued the first Permit in 2007. That permit was valid through August 31, 2012. As a result of action taken in the 2012 legislative session, a one-year Permit that is virtually unchanged has been issued for the period of September 1, 2012, through August 31, 2013 (see [Western Washington Phase II 2012-2013 Stormwater Permit](#)). Ecology has also issued the Permit that will become effective on September 1, 2013, and will be valid for five years ([Western Washington Phase II 2013-2018 Stormwater Permit](#)).

Appealing the Phase II NPDES Stormwater Permit

Once issued, there is a 30-day window in which Permit appeals must be filed with the Pollution Control Hearings Board. A coalition of local cities, and one county, filed an appeal on August 31st, 2012 (Attachment A). Additional jurisdictions may join the appeal after the submittal date. The coalition of local jurisdictions has hired the law firm of Foster Pepper to represent them

through the appeal process. Under the interlocal agreement attached to the resolution, each jurisdiction would participate in legal expenses based upon their respective population. As a city with a population of greater than 50,000, Kirkland's participation would be capped at \$25,000.00. Funds for participation in the appeal process would be drawn from Surface Water Utility reserves per the attached fiscal note (Attachment B).

Why should Kirkland join the appeal?

Staff recommends participation in the appeal of the 2013-2018 Permit because of potential conflicts between City and State authority and the Permit. Kirkland is committed to water quality improvement as noted below, but the 2013-2018 Permit includes requirements that could lead to significant legal conflicts. The concern is *how* the work will be done, rather than *whether* the work should be done to improve water quality. Staff would prefer to concentrate on programs and projects that improve water quality and support economic development, rather than having to engage in expensive and time-consuming legal conflicts over land use planning. In addition, there are several instances in which specific technical requirements may require expensive changes to City construction methods that have a questionable impact on water quality.

Attachment A is the full appeal document. Of the issues listed, the following are of most concern to Kirkland staff:

Vesting: Permit language does not clearly allow for vesting of development projects. This could put the City in a position of being out of compliance with the Permit if it grants land use vesting according to State Law.

Low Impact Development Practices: Permit language requires land use planning to accommodate low impact development. In Washington State, land use planning is governed by the Growth Management Act. Placing land use planning requirements in the Permit may lead to conflicts between the Permit and City and State land use regulations.

Elimination of the One-Acre Threshold: The 2007-2012 Permit required that local jurisdictions apply the Permit-specified stormwater requirements to sites of one acre or greater in size, and that cities continue to regulate stormwater for smaller sites at a level equal or greater to what they were requiring at the beginning of the Permit term. The 2013-2018 Permit eliminates the one-acre threshold and requires that Permit-specific stormwater requirements be applied to all sites. This eliminates the flexibility to regulate small sites in a way that makes sense for Kirkland. For example, the Permit would require that all sites, regardless of size, create and submit a "Stormwater Pollution Prevention Plan" (SWPPP). This voluminous document details erosion control and spill prevention and control measures and requires that a Certified Erosion and Sediment Control Lead be present on all sites. While the SWPPP process is effective for large sites, it is inefficient and overly costly for small sites. Kirkland currently requires a simpler erosion control plan and process for sites under 1 acre in size.

Prescriptive Technical Requirements: There are several instances in the Permit where jurisdictions are required to take specific actions, even though site conditions and other factors may mean that these actions may not improve water quality in all instances and the actions will be costly. For example, the Permit requires that certain types of public streets be paved using permeable surfaces. Permeable surfaces can help to improve water quality and reduce runoff volumes in many cases, but may actually create water quality and flow problems if a site has soils that do not allow water to infiltrate quickly. Permeable pavements are initially more expensive than traditional paving surfaces, and cannot be slurry-sealed, which will increase

maintenance costs. In addition, it is inadvisable to place utilities under permeable paving surfaces which may increase right of way needs for transportation projects. Staff would prefer to examine permeable pavements as one of a range of options that could be used at a given site to protect and improve water quality, rather than being required to do this for all projects.

Kirkland's Permit Compliance – Commitment to Water Quality Improvement

Stormwater has been identified as the number one pollutant impacting the health of Puget Sound. Kirkland has and will continue to find cost-effective and efficient means to improve the quality of the stormwater that it discharges to Lake Washington and ultimately to Puget Sound.

Kirkland formed a Surface Water Utility in 1998 with goals to reduce flooding, improve water quality, and to improve and protect fish habitat. Early work to improve water quality put the City in a good position to comply with the 2007-2012 Permit. On-going water quality work comes at a cost of approximately \$5.1 million per year, or 60% of the Surface Water Utility's operating budget. Although this is a large cost, many of the items required for Permit compliance also serve other purposes. For example, cleaning catch-basins and pipes reduces flooding in addition to protecting water quality. For further details on Kirkland's NPDES compliance work, please see [Kirkland 2012 Stormwater Management Program](#) .

In addition to public costs, updated Permit requirements will result in increased costs for private development projects. More stringent flow control and water quality standards are aimed at fully mitigating the stormwater impacts of development at the time of construction. Although this approach saves money in the long-term as it reduces the need for projects to repair environmental damage, it can result in higher short-term costs as developers may be required to change site layouts and/or construct larger facilities to control stormwater.

Engineering staff continue to investigate ways to lower costs for developers while achieving water quality protection and improvement required by the Permit. Regional facilities with a fee-in-lieu program and use of certain low impact development techniques on a watershed scale are examples of approaches that can lower the cost of stormwater mitigation for developers. These ideas will be further explored through the update of the City's Surface Water Master Plan, which is currently in progress and due for completion in 2013.

Next Steps

Should Council vote to approve the attached resolution, regular updates on the appeal process will be provided by the City Attorney's Office.

Attachment A: NPDES Appeal Document

Attachment B: Fiscal Note for Use of Surface Water Utility Reserves

Resolution Authorizing the City Manager to Sign the ILA for legal services

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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

COALITION OF GOVERNMENTAL ENTITIES: CITY OF AUBURN, CITY OF BAINBRIDGE ISLAND, CITY OF BELLEVUE, CITY OF BURLINGTON, CITY OF EVERETT, CITY OF KENT, CITY OF ISSAQUAH, CITY OF MOUNT VERNON, CITY OF RENTON, CITY OF SEATAC, CITY OF SNOQUALMIE, CITY OF SUMNER, all of which are municipal corporations of the State of Washington, and COWLITZ COUNTY, a political subdivision of the State of Washington,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

NO.

NOTICE OF APPEAL

I. INTRODUCTION

1.1 Appellant, Coalition of Washington Governmental Entities (“the Coalition”), hereby appeals the Western Washington Phase II Municipal Stormwater Permit issued by the Washington State Department of Ecology (“Ecology”) on August 1, 2012; Effective Date: August 1, 2013; Expiration Date: July 31, 2018 (“the Permit”).

1 **III. ADDITIONAL PARTY**

2 3.1 The other party to this appeal is the Washington State Department of Ecology,
3 which issued the Permit that is the subject of this appeal.

4 **IV. ORDER OR DECISION APPEALED FROM**

5 4.1 The Coalition appeals the Western Washington Phase II Municipal Stormwater
6 Permit (“the Permit”) issued by Ecology on August 1, 2012; Effective Date: August 1, 2013;
7 Expiration Date: July 31, 2018. A copy of the Permit, along with the Public Notice for the
8 issuance of said Permit is attached as Exhibit “B.”

9 **V. FACTS AND BASIS FOR APPEAL**

10 5.1 Municipal stormwater is unique in many respects, including the fact that
11 municipalities do not generate, and simply cannot completely control all of the pollutants that
12 find their way into municipal separate storm sewer systems. Municipal storm sewer systems are
13 complex collection systems that often encompass hundreds or thousands of miles and have
14 dozens or hundreds of outfalls. Unlike traditional NPDES permits that regulate a source of
15 pollutants, municipal storm sewer systems collect urban runoff with pollutants that are generated
16 by all of us.
17

18 5.2 Because of the unique differences between municipal stormwater and other
19 sources of water regulated under traditional NPDES permits, municipal stormwater permits are
20 intended to be flexible, programmatic permits. The need for this flexibility is recognized in
21 Washington State’s All Known and Reasonable Methods of Treatment (“AKART”) standard,
22 and in the federal Clean Water Act’s Maximum Extent Practicable (“MEP”) standard.
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1 5.3 In multiple respects, however, the Permit issued by Ecology replaces that
2 necessary flexibility with highly prescriptive requirements. In many cases, Ecology imposed
3 these requirements without considering their cost, feasibility, or practicability, and without
4 considering their impact on or reconcilability with other local governmental programs.
5 Additionally, many provisions of the Permit place unreasonable restrictions on growth and
6 economic development, which affects local government and the economic health of the
7 communities that Coalition members are charged to protect. These failures are critical and their
8 collective impact is extreme: each of the Coalition members is experiencing severe financial
9 challenges and many Coalition members are struggling to fund even basic public safety services.
10

11 5.4 In many instances, the Permit's prescriptive requirements were not legally
12 required, but instead were imposed by Ecology without reasonably considering alternative, more
13 flexible approaches that would take into account the unique nature of municipal stormwater. The
14 Coalition members and other local governments expressed some of these concerns and others
15 during the public comment period, so Ecology was aware of them, but chose to make nominal
16 revisions to the draft Permit.
17

18 5.5 Finally, this is a Permit that regulates over 85 municipalities – all of which are
19 unique in many respects, including population, experience, geography, and fiscal resources. In
20 short, the Permit is simply not appropriate to a “one size fits all” solution.
21

22 5.6 For the foregoing reasons and others that will be proved at the hearing of this
23 matter, Ecology acted unreasonably, unjustly, or unlawfully in imposing the following conditions
24 and/or provisions in the Permit:
25
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1 A. Provisions in the Permit, including but not limited to Condition S5.C.4,
2 Condition S5.C.5, Appendix 1, and referenced provisions of Ecology's Stormwater
3 Management Manual for Western Washington, that interfere with and/or conflict with land use
4 planning, the Growth Management Act, vesting, and other local governmental functions, impose
5 burdensome and unreasonable new requirements, adversely affect the economic health of
6 Coalition members and their communities, and impose economic burdens on Coalition members
7 and their communities.
8

9 B. Low Impact Development ("LID") provisions in the Permit, Appendix 1,
10 and referenced provisions of Ecology's Stormwater Management Manual for Western
11 Washington, that interfere with and/or conflict with land use planning, the Growth Management
12 Act, vesting, and other local governmental functions, impose burdensome and unreasonable new
13 requirements, rely on unproven technologies with potentially unintended consequences, and
14 adversely affect the economic health of Coalition members and their communities, and impose
15 economic burdens on Coalition members and their communities.
16

17 C. The LID Performance standard referenced in the Permit, Appendix 1
18 and/or Ecology's Stormwater Management Manual for Western Washington, which adds control
19 of flow durations between 8% of the 2-year and 50% of the 2-year storm to the existing flow
20 control standard (control between 50% of the 2-year to the 50-year flow) on the basis that this
21 requirement for managing stormwater is unreasonable, impracticable, and economically
22 burdensome.
23

24 D. LID provisions in the Permit, Appendix 1, and corresponding referenced
25 provisions of Ecology's Stormwater Management Manual for Western Washington, on the basis
26

1 that Ecology acted unreasonably, unjustly or unlawfully by failing to conduct a sufficient
2 economic evaluation, cost-benefit analysis, or by otherwise failing to adequately evaluate and
3 consider the economic and/or environmental impacts and costs of these requirements on
4 Coalition members, their citizens, and businesses.

5 E. Condition S5.C.3.c.i, which requires permittees to field screen 40% of
6 their municipal separate storm sewer system by December 31, 2017 and 12% of their municipal
7 separate storm sewer system each year thereafter on the basis that field screening is largely
8 ineffective to locate illicit discharges because of their intermittent nature. This provision of the
9 Permit is expensive in terms of staffing and testing, with little or no benefit to water quality.

10 F. Elimination of the one-acre threshold in Condition S5.C.4 for the reasons
11 set forth above and because eliminating the one-acre threshold for all permittees, without
12 considering the unique circumstances of the many local jurisdictions regulated by this Permit, is
13 unreasonable, impracticable, and economically burdensome.

14 G. Provisions in Condition S5.C.4.g, which require participation in
15 watershed-scale stormwater planning led by a Phase I County under the Phase I Municipal
16 Stormwater General Permit on the basis that the provisions go beyond state and federal
17 regulatory requirements and are unreasonable and infeasible in the context of this Permit.

18 H. Provisions in S5.C.5 that require catch basin inspections every two years
19 on the basis that it is overly prescriptive, unreasonable, impracticable, and expensive without a
20 corresponding environmental benefit.

21 I. Provisions in the Permit and Appendix 1 that reference or are based upon
22 Ecology's Stormwater Management Manual for Western Washington on the basis that there was
23

1 no opportunity for meaningful review and comment afforded Coalition members because the
2 draft Permit and draft Manual were issued at the same time and, in certain instances, referenced
3 future guidance that was not drafted or available for review.

4 J. Provisions in the Permit that require use of Ecology documents and a
5 stormwater manual, which Ecology characterizes as “guidance,” when in reality those documents
6 and manual are used in this Permit as regulatory requirements with no feasible, practicable, or
7 reasonable alternatives available to permittees, the community, or businesses that are also
8 regulated or affected by the Permit’s requirements.

9 K. Provisions in Condition S8A that require reporting of any stormwater
10 monitoring or stormwater-related studies conducted by the Permittee or on behalf of the
11 Permittee and stormwater-related investigations conducted by other entities reported to the
12 Permittee on the basis that these permit requirements are not legally required or reasonable.

13 L. Provisions in Condition S8 pertaining to payment into a collective fund to
14 the extent that the Permit does not state where monitoring or studies will occur, how the
15 collective funds will be spent by Ecology, and how the data and information collected by
16 Ecology will be used.

17 M. The definitions of “outfall,” and “receiving waters,” “municipal separate
18 storm sewer system,” and “MS4” are appealed on the basis that they are confusing,
19 unreasonable, and exceed the scope of applicable law and/or regulatory requirements.

20 N. The inclusion of “interflow” in the definition of “stormwater” is appealed
21 on the basis that it is factually inaccurate, confusing, unreasonable, and exceeds the scope of
22 applicable law and/or regulatory requirements.

1 O. Appendix I requirements that pertain to the use of porous pavement for
2 roads absent certain exceptions on the basis that these requirements are unreasonable and exceed
3 the scope of regulatory requirements.

4 P. Ecology acted unreasonably, unjustly or unlawfully by failing to conduct a
5 sufficient economic analysis or cost-benefit analysis, or by otherwise failing to adequately
6 evaluate and consider the economic or environmental impacts and/or costs of the Permit on the
7 regulated community, including Coalition members, their citizens, and businesses that are
8 impacted and affected by the Permit.
9

10 **VI. RELIEF REQUESTED**

11 6.1 Appellants respectfully request that the Board issue an Order remanding the
12 Permits to Ecology with direction to address the Permit deficiencies as set forth above.

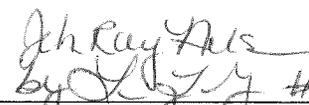
13 6.2 Appellants request such other and further relief as the Board deems appropriate.
14

15 DATED this 30st day of August, 2012.

16 FOSTER PEPPER PLLC

FOSTER PEPPER PLLC

17 
18 _____
LORI TERRY GREGORY, WSBA # 22006
19 Attorney for Appellants
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23 _____
JOHN RAY NELSON, WSBA # 16393
24 Attorney for Appellants
Telephone: (509) 777-1604
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E-mail: nelsj@foster.com
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 30, 2012, I caused to be served upon the parties in this action a true and correct copy of the Notice of Appeal via facsimile (without exhibits) and via mail (with exhibits).

1. Department of Ecology
Attn: Appeals Processing Desk
300 Desmond Drive, SE
Lacey, WA 98503
Fax: (360) 407-6989
2. Department of Ecology
Attn: Appeals Processing Desk
P.O. Box 47608
Olympia, WA 98504-7608
3. Ted Sturdevant, Director
Department of Ecology
300 Desmond Drive, SE
Lacey, WA 98503
Fax: (360) 407-6989
4. Kelly Susewind
Water Quality Program Manager
Department of Ecology
300 Desmond Drive, SE
Lacey, WA 98503
Fax: (360) 407-6426
5. Ronald L. Lavigne
Office of the Attorney General
Ecology Division
2425 Bristol Court SW
Olympia, WA 98502
Fax: (360) 586-6760
6. Ronald L. Lavigne
Office of the Attorney General
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117

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I declare under penalty of perjury that the foregoing is true and correct.

DATED this 30th day of August 2012, at Seattle, Washington.

FOSTER PEPPER, P.L.L.C.

By 
Sherry Toves

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

COALITION OF GOVERNMENTAL ENTITIES: CITY OF AUBURN, CITY OF BAINBRIDGE ISLAND, CITY OF BELLEVUE, CITY OF BURLINGTON, CITY OF DES MOINES, CITY OF EVERETT, CITY OF KENT, CITY OF ISSAQUAH, CITY OF MOUNT VERNON, CITY OF RENTON, CITY OF SEATAC, CITY OF SNOQUALMIE, CITY OF SUMNER, all of which are municipal corporations of the State of Washington, and COWLITZ COUNTY, a political subdivision of the State of Washington,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

NO.

AMENDED NOTICE OF APPEAL

Appellant, Coalition of Washington Governmental Entities (“the Coalition”), hereby amend its Notice of Appeal filed on August 30, 2012, in the following respects:

1. The City of Des Moines is added to the caption and Appendix A.
2. The following Permit provisions are also appealed: Condition S1.A.2 of the Permit and definition of urbanized areas are appealed on the basis that they set forth

AMENDED NOTICE OF APPEAL - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 requirements that are incapable of being implemented and unreasonable. Condition S1.A.2
2 states that the geographic area of coverage for the Permit is the urbanized area and growth areas
3 associated with permitted cities under the jurisdiction control of the county. The definition of
4 urbanized area in the Permit states that these areas are designed by the U.S. Census Bureau based
5 on the most recent decennial census. The most recent decennial census is the 2010 census;
6 however, the 2010 urbanized area boundary has not yet been released. This places Permittees in
7 an untenable, unreasonable, and potentially expensive situation because the Permit compels
8 certain actions based on an urbanized area boundary that does not yet exist in the 2010 decennial
9 census. If Permittees elect to wait and do nothing until the 2010 urbanized area boundary has
10 been released, they risk liability for failing to comply with the Permit obligations associated with
11 the urbanized area. If they elect to use the 2000 urbanized area boundary, they risk wasting
12 resources using a boundary that is subsequently changed when the 2010 urbanized area boundary
13 is established, forcing the work to be redone. Neither of these scenarios is reasonable and the
14 Permit language should be clarified to avoid placing Permittees in this situation.
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17 3. In all other respects, the original Notice of Appeal is incorporated by reference.

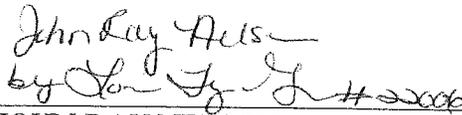
18 DATED this 31st day of August, 2012.

19 FOSTER PEPPER PLLC

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21
22 LORI TERRY GREGORY, WSBA # 22006
23 Attorney for Appellants
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AMENDED NOTICE OF APPEAL - 2

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 31, 2012, I caused to be served upon the parties in this action a true and correct copy of the Amended Notice of Appeal via facsimile (without exhibits) and via mail (with exhibits).

1. Department of Ecology
Attn: Appeals Processing Desk
300 Desmond Drive, SE
Lacey, WA 98503
Fax: (360) 407-6989

2. Department of Ecology
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I declare under penalty of perjury that the foregoing is true and correct.

DATED this 31st day of August 2012, at Seattle, Washington.

FOSTER PEPPER, P.L.L.C.

By Sherry R. Toves
Sherry Toves

EXHIBIT A

AMENDED EXHIBIT "A"

COALITION MEMBERS

CITY OF AUBURN
CITY OF BAINBRIDGE ISLAND
CITY OF BELLEVUE
CITY OF BURLINGTON
CITY OF DES MOINES
CITY OF EVERETT
CITY OF KENT
CITY OF ISSAQUAH
CITY OF MOUNT VERNON
CITY OF RENTON
CITY OF SEATAC
CITY OF SNOQUALMIE
CITY OF SUMNER
COWLITZ COUNTY

FISCAL NOTE

CITY OF KIRKLAND

Source of Request							
Ray Steiger, Public Works Director							
Description of Request							
Request for funding of up to \$25,000 from Surface Water Operating fund working capital for an interlocal legal services agreement associated with the appeal of the National Pollutant Discharge Elimination System (NPDES) Phase II Stormwater Permit.							
Legality/City Policy Basis							
Fiscal Impact							
One-time use of \$25,000 of Surface Water Operating fund working capital. The reserve is able to fully fund this request.							
Recommended Funding Source(s)							
<i>Reserve</i>	Description	2012 Est End Balance	Prior Auth. 2011-12 Uses	Prior Auth. 2011-12 Additions	Amount This Request	Revised 2012 End Balance	2012 Target
	Surface Water Working Capital	863,371	53,307	0	25,000	785,064	N/A
	Prior 2011-12 Authorized Uses of this reserve: \$53,307 for the purchase of a Screwsucker pump.						
<i>Revenue/Exp Savings</i>							
<i>Other Source</i>							
Other Information							
Surface Water Operating fund working capital is available for unanticipated expenditures.							

Prepared By	Neil Kruse, Senior Financial Analyst	Date	July 25, 2012
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RESOLUTION R-4937

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND APPROVING AN INTERLOCAL AGREEMENT BETWEEN THE CITIES OF AUBURN, BAINBRIDGE ISLAND, BELLEVUE, BURLINGTON, DES MOINES, EVERETT, ISSAQUAH, KENT, KIRKLAND, MOUNT VERNON, RENTON, SEATAC, SNOQUALMIE AND SUMNER AND COWLITZ COUNTY REGARDING LEGAL SERVICES.

WHEREAS, the participating jurisdictions (Coalition) desire to enter into an interlocal agreement to explore all legal and other avenues available to challenge the recently adopted Department of Ecology (DOE) Standards; and

WHEREAS, the Phase II National Pollutant Discharge Elimination System (NPDES) Permit is required under provisions of the Federal Clean Water Act and requires members of the Coalition to develop and maintain storm water programs; and

WHEREAS, the DOE Standards, purportedly adopted under the NPDES Permit authority, may impose costly burdens on landowners, including members of the Coalition and may also cause costly legal challenges to members of the Coalition as a result of enforcing the Standards; and

WHEREAS, the potential impact of the DOE Standards on members of the Coalition and property owners is so significant and far-reaching, members of the Coalition are joining together to file an appeal with the Pollution Control Hearings Board; and

WHEREAS, members of the Coalition wish to retain outside counsel to represent the Coalition in the appeal and wish to collectively pay for legal services; and

WHEREAS, the members of the Coalition are public agencies as defined by Ch. 39.34 of the Revised Code of Washington, and may enter into interlocal agreements on the basis of mutual advantage to provide services and facilities in the manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Manager is hereby authorized and directed to execute on behalf of the City of Kirkland an Interlocal Agreement substantially similar to that attached as Exhibit "A", which is entitled "Interlocal Agreement between the Cities of Auburn, Bainbridge Island, Bellevue, Burlington, Des Moines, Everett, Issaquah, Kent,

Kirkland, Mount Vernon, Renton, SeaTac, Snoqualmie and Sumner and Cowlitz County Regarding Legal Services."

Passed by majority vote of the Kirkland City Council in open meeting this ____ day of _____, 2012.

Signed in authentication thereof this ____ day of _____, 2012.

MAYOR

Attest:

City Clerk

INTERLOCAL AGREEMENT BETWEEN THE CITIES OF AUBURN, BAINBRIDGE ISLAND, BELLEVUE, BURLINGTON, DES MOINES, EVERETT, ISSAQUAH, KENT, MOUNT VERNON, RENTON, SEATAC, SNOQUALMIE AND SUMNER AND COWLITZ COUNTY REGARDING LEGAL SERVICES

THIS INTERLOCAL AGREEMENT ("Agreement") is entered into between the Cities of Auburn, Bainbridge Island, Bellevue, Burlington, Des Moines, Everett, Issaquah, Kent, Mount Vernon, Renton, SeaTac, Snoqualmie, Sumner and Cowlitz County and any other Phase II Permittees that might join this Coalition of Governmental Entities (collectively, "Coalition").

RECITALS

1. The members of the Coalition are public agencies as defined by Ch. 39.34 of the Revised Code of Washington, and may enter into interlocal agreements on the basis of mutual advantage to provide services and facilities in the manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.

2. The Phase II National Pollutant Discharge Elimination System (NPDES) Permit is required under provisions of the Federal Clean Water Act and requires members of the Coalition in Washington to develop and maintain storm water programs. The Department of Ecology (DOE) has adopted standards (DOE Standards) purportedly under the NPDES Permit authority that may impose costly burdens on landowners, including members of the Coalition and may also cause costly legal challenges to members of the Coalition as a result of enforcing DOE Standards.

3. The potential impact of the DOE Standards on members of the Coalition and property owners is so significant and far-reaching, members of the Coalition are joining together to explore all legal and other avenues available to challenge the DOE Standards including but not limited to filing an appeal with the Pollution Control Hearings Board. The appeal deadline is August 31, 2012, the effective date of the DOE Standards. Members of the Coalition wish to retain outside counsel (Counsel) to represent the Coalition in said legal challenge(s) and wish to collectively pay Counsel as further set forth below.

4. NOW THEREFORE, in consideration of the terms and provisions contained herein, Coalition agrees as follows:

AGREEMENT

1. Purpose: It is the purpose of this Agreement to have the Coalition collectively pay for the legal services of Foster Pepper PLLC, or other selected legal counsel(Legal

Services) to represent the Coalition's interests in any legal challenges to the NPDES Phase II permits (Litigation).

2. Duration: This Agreement shall be effective August 13, 2012, irrespective of the date members of the Coalition execute this Agreement. Unless terminated by any party in accordance with Paragraph 5, Termination, the Agreement shall remain in full force and effect through conclusion of the Legal Services either through settlement of the dispute with the State of Washington, Pollution Control Hearings Board order, court order or other court disposition by the highest court authorized to hear an appeal of this matter, and/or other mutual resolution of the legal challenge or Legal Services as agreed to among members of the Coalition as provided in Paragraph 5.2 of this Agreement.

3. Administration: Coalition shall enter into a Joint Prosecution Agreement for the administration of the Legal Services and Litigation. Said Joint Prosecution Agreement shall include, but need not be limited to, a confidentiality agreement, establishing a structure for the administration and oversight of the Legal Services and Litigation that is efficient and effective given the number of Coalition who are parties to this Agreement, including oversight of the legal costs incurred pursuant to this Agreement and any other subjects necessary or appropriate to the administration of the Legal Services and prosecution of the Litigation. If this Agreement is effective prior to finalizing the Joint Prosecution Agreement, Coalition authorize the City of Bellevue to be Lead Agency to do all things necessary and/or appropriate to pursue the Litigation on behalf of Coalition including but not limited entering into an agreement for Legal Services as contemplated herein.

4. Payment:

4.1 The Legal Services' fees and costs shall be shared by members of the Coalition based upon the cost-sharing formula set forth in Exhibit "A" attached hereto and incorporated by this reference. This obligation shall continue through conclusion of the Legal Services as provided in Paragraph 2 above, unless a member of the Coalition terminates its participation in this Agreement as provided in Paragraph 5. Members of the Coalition hereby authorize said fees and costs up to \$255,000. The amount of this authorization may be increased administratively with the addition of new Coalition members up to a total of \$500,000. Provided, however, any increase in the cost of legal services that would require additional payments from any Coalition members in excess of the obligations set forth in Exhibit "A" shall require amendment of this Agreement unless an individual Coalition member expressly volunteers to increase its share without the necessity of amendment of this Interlocal Agreement.

4.2 The provider of Legal Services shall provide a monthly bill of its fees and costs to Bellevue. Bellevue shall timely pay the bill on behalf of Coalition. Within 15 days of approval of this Agreement, each member of the Coalition shall remit its proportionate share of the fees and costs to the City of Bellevue. Bellevue shall place these funds into an interest-bearing account, with any interest derived from these funds to be applied to the costs of the provider of Legal Services. At the time of drafting of this Agreement 12 governmental entities have committed to joining this appeal, and based upon the cost-

sharing formula set forth in Exhibit "A" hereto, each member of the Coalition is obligated to make payment of its proportionate share to the City of Bellevue. In the event Bellevue must take legal action to collect any amount due from a member of the Coalition, Bellevue shall be entitled to recover all costs for said action including reasonable attorney's fees.

4.3 In the event additional governmental entities join this Agreement, each new member of the Coalition shall be obligated to payment to the City of Bellevue based upon the cost-sharing formula set forth in Exhibit "A".

4.4 While it is recognized that members of the Coalition may not be able to sign this Agreement before August 31, 2012 it is agreed that the members will benefit from the Legal Services provided herein. Therefore, it is presumed that a member of the Coalition which enters into and signs this Agreement agrees to pay for Legal Services performed from and after August 13, 2012, regardless of the date of signing. Adjustments to amounts previously billed and received by Bellevue due to later joining members of the Coalition will be reconciled on a semi-annual basis.

5. Termination:

5.1 Termination by Notice: Any participating member of the Coalition may terminate its participation in this Agreement by providing at least sixty (60) days prior written notice to all other participating members. The terminating member must pay the full share of the Legal Services Fees and Costs due through the date of termination three months from the date of Notice. Should it become necessary to amend this Agreement to increase the authorized total amount of fees and costs set forth in Paragraph 4.1, or a member's proportionate share pursuant to Paragraph 4.3, any member may terminate its participation in this Agreement by providing written notice to all other participating members within 15 days of receiving written notice of the request to amend fees and costs. This termination shall not affect the obligation of the terminating member to pay its full share of the currently authorized Legal Services Fees and Costs, and shall not entitle the terminating member to any refund of monies already paid to the Coalition. Except as provided in Paragraph 5.2, the termination of a member's participation in this Agreement shall not result in the termination of this Agreement with respect to other members of the Coalition.

5.2 Termination by Mutual Written Agreement. This Agreement may be terminated at any time by mutual written agreement of a majority of the then participating members of the Coalition. Members shall be obligated to pay for Legal Services incurred to the date of Notice to the provider of Legal Services that its services are no longer needed and any reasonable additional fees and costs necessary to conclude its Legal Services.

5.3 Distribution of Assets upon Termination. It is not anticipated that any assets will be acquired as a result of participating in this Agreement. If, however, any assets are acquired with joint funds of the Members of the Coalition, those assets will be equally divided among the members at the asset's fair market value upon termination. The value of the assets shall be determined by using commonly accepted methods of valuation. Additionally, any funds remaining in the interest-bearing account following conclusion of all

Legal Services shall be divided among the members of the Coalition in amounts proportionate to the members' contributions to the Agreement based upon the cost-sharing formula contained in Exhibit "A and any other voluntary contributions made by that member.

6. Miscellaneous:

6.1 Amendments. Except as expressly provided herein, this Agreement may only be amended by mutual written agreement of the members of the Coalition.

6.2 Severability. If any section of this Agreement is adjudicated to be invalid, such action shall not affect the validity of any section not so adjudicated.

6.3 Interpretation. The legal presumption that an ambiguous term of this Agreement should be interpreted against the party who prepared the Agreement shall not apply.

6.4 Ownership of Property. Any property owned and used by Bellevue in connection with this Agreement shall remain the property of Bellevue and any property owned and used by any other participating member of the Coalition shall remain the property of that member, unless otherwise specifically provided in this Agreement or its amendment.

6.5 Notice. All communications regarding this Agreement will be sent to the parties at the addresses listed on the signature page of the Agreement, unless notified to the contrary. Any written notice shall become effective upon personal service or three (3) business days after the date of mailing by registered or certified mail, and will be deemed sufficiently given if sent to the addressee at the address stated in this Agreement or any other address if later specified in writing. Except for the requirement of Notice as provided in this Agreement, nothing herein shall be construed to prevent the members of the Coalition from communicating among themselves by email, fax or other electronic means. Any governmental agency not specifically named herein, that later joins in this Agreement, shall give to all members of the Coalition then participating under this Agreement written notice of the name and address of the person that can accept notices on behalf of such joining governmental agency.

6.6 Counterparts. This Agreement may be entered into with any number of counterparts which, taken collectively, will constitute one entire agreement.

6.7 Ratification and Confirmation. All acts taken prior to the effective date of this Agreement that are consistent with the intent and purpose of the same are hereby ratified and confirmed retroactive to August 13, 2012.

6.8 Dispute Resolution. Should any dispute arise among members of the Coalition or between one or more members related to the interpretation, application or administration of this Agreement, the disputing parties shall participate in a good faith mediation effort to resolve their differences prior to bringing any legal action.

6.9 Compliance with RCW 39.34.040. Members of the Coalition entering into this Agreement shall be responsible for ensuring that it is filed in accordance with RCW 39.34.040.

IN WITNESS, the parties below execute this Agreement, which shall become effective August _____, 2012.

<p>AUBURN:</p> <p>CITY OF AUBURN</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>	<p>BAINBRIDGE ISLAND:</p> <p>CITY OF BAINBRIDGE ISLAND</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>
<p>NOTICES TO BE SENT TO:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>	<p>NOTICES TO BE SENT TO:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>
<p>APPROVED AS TO FORM:</p> <p>_____</p>	<p>APPROVED AS TO FORM:</p> <p>_____</p>

<p>BELLEVUE:</p> <p>CITY OF BELLEVUE</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>	<p>BURLINGTON:</p> <p>CITY OF BURLINGTON</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>
<p>NOTICES TO BE SENT TO:</p> <p>_____</p>	<p>NOTICES TO BE SENT TO:</p> <p>_____</p>

<p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>	<p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>
<p>APPROVED AS TO FORM:</p> <p>_____</p> <p>_____</p>	<p>APPROVED AS TO FORM:</p> <p>_____</p> <p>_____</p>
<p>DES MOINES:</p> <p>CITY OF DES MOINES</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>	<p>EVERETT:</p> <p>CITY OF EVERETT</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>
<p>NOTICES TO BE SENT TO:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>	<p>NOTICES TO BE SENT TO:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>
<p>APPROVED AS TO FORM:</p> <p>_____</p> <p>_____</p>	<p>APPROVED AS TO FORM:</p> <p>_____</p> <p>_____</p>

<p>ISSAQUAH:</p> <p>CITY OF ISSAQUAH</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p>	<p>KENT:</p> <p>CITY OF KENT</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p>
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Date: _____	Date: _____
<p>NOTICES TO BE SENT TO:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>	<p>NOTICES TO BE SENT TO:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>
<p>APPROVED AS TO FORM:</p> <p>_____</p>	<p>APPROVED AS TO FORM:</p> <p>_____</p>
<p>MOUNT VERNON:</p> <p>CITY OF MOUNT VERNON</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>	<p>RENTON:</p> <p>RENTON</p> <p>By: _____</p> <p>Print Name: _____</p> <p>Its: _____</p> <p>Date: _____</p>
<p>NOTICES TO BE SENT TO:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>	<p>NOTICES TO BE SENT TO:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>() _____ - _____ (Telephone)</p> <p>() _____ - _____ (Facsimile)</p>
<p>APPROVED AS TO FORM:</p> <p>_____</p>	<p>APPROVED AS TO FORM:</p> <p>_____</p>
<p>SEATAC:</p> <p>CITY OF SEATAC</p> <p>By: _____</p>	<p>SNOQUALMIE:</p> <p>CITY OF SNOQUALMIE</p> <p>By: _____</p>

<p>Print Name: _____ Its: _____ Date: _____</p>	<p>Print Name: _____ Its: _____ Date: _____</p>
<p>NOTICES TO BE SENT TO:</p> <p>_____ _____ _____</p> <p>() _____ - _____ (Telephone) () _____ - _____ (Facsimile)</p>	<p>NOTICES TO BE SENT TO:</p> <p>_____ _____ _____</p> <p>() _____ - _____ (Telephone) () _____ - _____ (Facsimile)</p>
<p>APPROVED AS TO FORM:</p> <p>_____</p>	<p>APPROVED AS TO FORM:</p> <p>_____</p>
<p>SUMNER:</p> <p>CITY OF SUMNER</p> <p>By: _____</p> <p>Print Name: _____ Its: _____ Date: _____</p>	<p>COWLITZ :</p> <p>COWLITZ COUNTY</p> <p>By: _____</p> <p>Print Name: _____ Its: _____ Date: _____</p>
<p>NOTICES TO BE SENT TO:</p> <p>_____ _____ _____</p> <p>() _____ - _____ (Telephone) () _____ - _____ (Facsimile)</p>	<p>NOTICES TO BE SENT TO:</p> <p>_____ _____ _____</p> <p>() _____ - _____ (Telephone) () _____ - _____ (Facsimile)</p>
<p>APPROVED AS TO FORM:</p> <p>_____</p>	<p>APPROVED AS TO FORM:</p> <p>_____</p>

EXHIBIT "A"

TO

INTERLOCAL AGREEMENT REGARDING LEGAL SERVICES

For purposes of pursuing an appeal of the 2013-18 NPDES permit issued by the state Department of Ecology on August 1, 2012, the following delineates the financial contributions to be made by members of the Governmental Entities Coalition.

Entities with a population of up to 10,000:	\$10,000
Entities with a population between 10,001 and 30,000	\$15,000
Entities with a population between 30,001 and 50,000	\$20,000
Entities with a population above 50,000	\$25,000